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PRACTICE OF THE LEARNED PROFESSIONS.

In taking an inventory of the acts of the Second Pan-American Conference to promote intercommunication between the American Republics, we must not leave out of account those proceedings which dealt with the question of interchange of ideas. For means which facilitate the spread of ideas of government and facts of science are quite as destructive of provincialism, narrowness and bigotry as are means which facilitate the interchange of products. It is, therefore, fortunate that the conference did not confine its attention entirely to means for promoting commerce, that it should have considered also the best methods of giving to each State the benefit of the ideas of the other. Nor is it strange that it should have considered that one of the surest ways for bringing about a community of ideas is by making it easy for each to come into close contact with some of the best thinkers of the other. While no one would claim that the members of the learned professions have a monopoly of the ideas of a country, it must, in fairness, be admitted that they are among its ablest and most progressive thinkers.

The original draft of a convention on this subject was presented by the Chilean delegation. It read as follows:

ARTICLE 1. The citizens of any of the republics signing the present convention, may freely exercise the profession for which they may be duly authorized by diploma or title granted by a competent national authority, even if such authority should not be of their native country, in any of the territories of the other nations, provided that such diploma or title complies with the regulations established in Articles 2 and 4, and that the laws of the country, in which it is desired to practice the profession, do not require the practitioner to be a citizen.

The certificate of preparatory and higher studies, issued by any of the countries, parties to this convention, in favor of citizens, of one of their number, shall have in all the rest of the contracting countries, the same effect as that authorized by the laws of the republic of their origin.

ARTICLE 2. Each one of the contracting parties, reserves, however, the right to require the citizens of another country who may present diplomas or titles of physician or any other profession related to surgery or medicine, including that of pharmacy, that they submit themselves to a previous general examination in the branch of the profession which the respective title or diploma authorizes to practice, in such a manner as may be determined by each government.

ARTICLE 3. Each one of the contracting parties shall give official notice to the others, regarding the universities and educational institutions of the signatory

countries whose titles and diplomas are considered valid for the practice of the professions, the subject of this convention, in its own territory.

ARTICLE 4. The diploma, title or certificate, of preparatory or higher studies, duly authenticated, and the certificate of identification of the person, given by the respective diplomatic or consular agent accredited to the country which has issued these documents, shall be sufficient evidence to meet the requirements contemplated by this convention, whenever they have been registered in the department of foreign relations of the country in which it is desired to practice the profession, which department shall inform accordingly the proper authorities of the country in which the respective title may have been issued.

ARTICLE 5. The present convention shall remain in force indefinitely, but any of the high contracting parties may cause it to be abrogated, in so far as such country is concerned, one year after having given the proper notice to the other contracting parties.

It shall not be an indispensable condition for the enforcement of this convention that it shall be ratified simultaneously by all the signatory nations. The country approving it shall communicate such approval to the other States through diplomatic channels and such proceedings shall answer the purpose of an exchange of ratifications. *Actos y Documentos, Sess., Nov. 29, page 4.*

The purpose of the proposed convention is stated by its sponsors in the following terms:

To place the scientific men of all these nations in contact with each other; to facilitate in each country the professional practice of knowledge acquired in different schools; and to open, throughout the entire extent of the territories which compose the contracting nations, a field of action for the intellectual activity of those who, enlightened by special studies, desire to work for honorable gain outside of their native land—these are the advantages beyond discussion, universally understood, and constitute an inspiration for a long time cherished by all the countries of America.

But though it may be well to favor the realization of these beneficial objects, by adopting prudent measures, still it does not appear advisable to grant them such absolute liberty as might prove adverse to the end desired. The proper protection of the populations over which the constituted authorities have the duty to watch, requires, on the contrary, a restriction of this liberty in such measure as is demanded by the high consideration of caution, and, it may be said, of police vigilance, the importance of which cannot be disregarded in domestic or international legislation. *Debates and Resolutions, page 222, A. y D. Sess., Nov. 29, page 3.*

This project and the reasons given in support of it were such that they were accepted by the Committee on Practice of the Learned Professions and Literary Relations, consisting of the following members: A. Blest Gana, M. Garcia Merou and M. Sanchez Marmol.

Discussion upon this report was opened by Mr. Pepper, who called attention to the fact that the granting of diplomas in the United States was not under the control of national authority, the universities being all under the control of the States or private corporations, and asked if it would not be possible to change the wording to "competent national authority of the State or other

authority," otherwise the United States would be excluded from the benefits of the convention. Mr. Gana suggested that this difficulty could be obviated by the United States furnishing a list of universities accepted by it. On the face of it, this suggestion would seem to solve the difficulty, but as it was not made in the form of an amendment there was nothing officially before the conference but the original report.

Mr. Gil Fortoul, delegate from Venezuela, requested that the American delegation state whether or not "when the universities of the States confer a title or diploma, these are immediately, and by the sole fact, accepted throughout the Union." To which Mr. Pepper replied that they might or might not be; that as each State made its own laws regulating such matters, "other States do not necessarily recognize diplomas issued in any certain State." This called forth the response from Mr. Fortoul "that if they were not recognized throughout the Union they ought not to be recognized by other republics, in other words, that they ought not to be accorded a recognition outside of the United States which they did not receive within it." *Debates and Resolutions*, page 225.

Mr. Arriago then raised the question whether or not, if the United States entered into a treaty according recognition to the diplomas of other States, it would be obligatory in all the States of the Union to recognize said diplomas. He said: "I have understood, from the words just uttered by the Honorable Mr. Pepper, that in these matters the States of the Union are sovereign. I doubt, therefore, if a treaty approved by the American Senate could be made effective in a State in a matter concerning its exclusive competency. And if it were so, that is to say, if this treaty approved by the Senate of the United States were not obligatory upon the various States, which have the right to legislate with respect to the professions, the result would be that, even after celebrating this convention, those States could not be forced to respect it while other nations would, and consequently the diplomas issued in other countries would have no effect in the United States." *Debates and Resolutions*, page 225.

This is precisely the question raised in our recent controversy with Japan over the exclusion of Japanese children from the public schools of San Francisco in the face of a treaty providing for most favored nation treatment, notwithstanding there was no attempt to exclude British, German or French children. It reveals one of the awkward uncertainties as the extent of our treaty-making power. Hence it is unfortunate that the Japanese case was compromised, rather than getting a decision of the United

States Supreme Court upon this point. It would seem highly desirable that we know to a certainty whether or not the Federal Government can make and enforce treaties upon questions of this nature.

To my mind there is no question that when by the constitution the treaty-making power was given to the Federal Government, without limitations, it was intended to give to it the same extent of power to make treaties as that possessed by other nations. There being no evidence to the contrary, it is fair to suppose the words "power to make treaties" were used in their ordinary sense. Nor is there any doubt that at that time the ordinary sense in which these words were used would include the power to make a treaty and to enforce it, even though its provision might be distasteful to the local subdivisions of the State. I cannot share the opinion of those who hold that the Federal Government has no power to make treaties regulating matters over which it has not power to legislate, or in other words, that it may not make treaties regulating affairs, concerning which the legislation is entrusted to the States. To me it does not seem inconsistent that the States might regulate for local purposes and the Federal Government for international purposes and if there is a clash it is not the treaty, which, under the Constitution is the "supreme law of the land," must give way, but the local authority.

I find this view in accord with the decision of the Supreme Court of the United States in the early case of *Ware v. Hylton*, 3 Dallas, 199. In this case a British subject sued a citizen of Virginia on a debt contracted prior to the Revolution. The latter pleaded the law of Virginia confiscating the debt. Against this defense the former set up the Treaty of 1783 which provided that "creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted." The impediment in this case was the law of Virginia confiscating the debt. Hence it was necessary for the Supreme Court to pass upon the question of the right of the Federal Government to annul by treaty the laws of a State with reference to the collection of debts—a subject over which the power of legislation is for most purposes entrusted to the States. It was decided by the Supreme Court of the United States reversing the Circuit Court for the district of Virginia, that the Treaty of 1783 rendered null the statute of Virginia inconsistent with it. That the matter of the collection of debts was a subject over which the State of Virginia had a right to legislate there can be no doubt. In this case it was said by Justice Chase: "But, it is asked, did the

fourth article intend to annul a law of the States and destroy rights acquired under it? I answer, that the fourth article did intend to destroy all lawful impediments, past and future; and that the law of Virginia is a lawful impediment; and would bar a recovery, if not destroyed by this article of the treaty. Our Federal Constitution establishes the power of a treaty over the constitution and law of any of the States; and I have shown that the words of the fourth article were intended, and are sufficient to nullify the law of Virginia and the payment under it." 3 Dall. page 242.

In the same case Justice Cushing said: "The State may make what rules it pleases, and those rules must necessarily have place within itself. But here is a treaty, the supreme law, which overrules all State laws on the subject, to all intents and purposes; and that makes the difference." *Ibid.*, page 284. To the same intent are the words of Justice Patterson, one of the framers of the Constitution: "The fourth article embraces all creditors, extends to all pre-existing debts, removes all lawful impediments, repeals the legislative act of Virginia, which has been pleaded in bar, and with regard to the creditor annuls everything done under it." *Ibid.*, page 256. And Justice Wilson, also one of the framers of the Constitution, says in his opinion: "The treaty annuls the confiscation. The fourth article is well expressed to meet the very case; it is not confined to debts existing at the time of making the treaty, but to debts *heretofore contracted*." *Ibid.*, page 281.

In *Chirac v. Chirac*, 2 Wheaton 259, it was held that the Federal Government could by treaty modify the law passed by the State of Maryland, placing restrictions upon the property rights of French subjects.

In the *United States v. Forty-three Gallons of Whiskey*, 93 U. S., 188, Justice Davis, speaking for the Court, said: "The power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy."

In his Constitutional Law, Vol. I, page 373, Thayer says: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations, is clear. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or cession of any portion of the territory of the latter, without its consent. But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted

touching any matter which is properly the subject of negotiation with a foreign country."

Commenting on the case of *Ware v. Hylton*, Butler says in his *Treaty Making Power of the United States*, Vol. II, page 7: "The opinions in this case alone, had they never been cited and approved in subsequent decisions, would be sufficient to justify any commissioners, concluding a treaty for the United States, in making whatever absolute provisions might, in their opinion be necessary and proper to gain any desired results and in regard to any matters, whether exclusively within the control of the States or not; and clothe the Central Government with ample power to enter into and enforce all such treaty stipulations."

Mr. Buchanan was therefore not without respectable authority upon which to base the answer given by him on behalf of the delegation from the United States: "With regard to the question asked by the distinguished gentlemen from Guatemala, concerning the power of the American Senate to celebrate this class of conventions, that can unquestionably be answered in the affirmative. If the Senate of the United States approves a treaty, it becomes the law of all the United States. The difficulty in this matter, however, Mr. President, is an organic one, and it lies in this fact: 'That in the United States the practice is to ascertain whether or not the applicant for the privilege of practicing one of the liberal professions has an adequate and competent education, rather than to investigate where he received that education.'

"Hence it occurs, for example, that in the State of New York all applicants for the right to practice any of the liberal professions are required by the regents of the University of the State of New York, to pass an examination, and that examination covers certain requirements,—none of them, however, referring to the fact as to where the applicant received his education, but all of them directed to ascertain whether or not he has received, whether in the United States or abroad, such an education as would entitle him to be a person to be considered competent to practice the profession he desires to enter." *Debates and Resolutions*, page 228.

Mr. Guachalla, the delegate from Bolivia, objected to the project on the ground that it contained restriction not contained in the treaties entered into between his and other countries. He urged that such being the case his country could not carry out the terms of the treaties if it were to bind itself to place restrictions not provided for in the other treaties. He, however, voted for it, with the understanding that it would not abrogate former treaties on this subject. *X-Debates and Resolutions*, page 224.

The Conference approved the report as a whole and the different articles were taken up for amendment. Mr. Foster, presented on behalf of the American delegation the following preamble and resolution:

Whereas the Colleges and Universities of the United States are not under the patronage of the National Government, and: Whereas these institutions differ in this respect from those of Spanish America, and: Whereas it is the desire of the conference that there should be the freest exchange of well accredited diplomas: Therefore the American delegation propose that they will earnestly recommend, to the respective States of the United States, that they, each and several, shall accredit and respect the diplomas of the Learned Professions of the National Colleges of Spanish America.

Second. We beg to urge the Spanish American Republics, each and several, to empower the competent authorities, or, in the absence of such power, to appoint competent officials to consider and decide upon credentials that may be offered by American citizens and to accept such credentials as may be satisfactory to such commissioners; such commissioners being fully empowered to accept or reject any credentials offered. Debates and Resolutions, page 229.

This proposition was referred to the committee. As was also the amendment offered by Mr. Fortoul, adding in Article 1 after national authority "or competent college, provided that said diploma or title grants the right to practice a profession throughout the territory of the republic where it was issued." Debates and Resolutions, page 231. It will be readily seen that so far as the United States is concerned this amendment would be of no assistance, as none of the citizens possess any such diplomas or titles, Mr. Fortoul seems to have recognized this fact as he puts the following question and then answers it: "How are they to overcome this difficulty in the United States? That is a question for them to decide. If these diplomas are not recognized throughout the country it is evident they cannot form a subject of international treaties."

Mr. Leger moved to amend paragraph 2 of Article 1 by adding the following clause: "provided that no advantages superior to those recognized by the legislation of the country in which it is desired to make use of said diploma may arise, and that there may be reciprocity." This amendment was also referred to the Committee.

The Committee accepted the amendment offered by Mr. Leger but reported adversely upon the other two. In explaining the action of the Committee with reference to the proposition of the American delegation it said: "A recommendation such as the one contained in the first paragraph of the proposition of the Honorable Mr. Foster addressed to the various States of the American Union, not knowing beforehand how it will be received by those

States, cannot be used as the basis of a contract in which must be established as a fundamental principle the equality of positive rights reciprocally accepted in recognition of titles or diplomas issued by the various countries signing the same." Debates and Resolutions, page 233. It is not at all difficult to understand how a lawyer would take this view of the case. The United States had no reason to complain if it did not receive a privilege which it could not grant. But in the interests of harmony, the Committee reported an additional article which had received in advance the approval of the American delegation.

ARTICLE 2. As to professional titles issued by Colleges and Universities of each State and Territory and by the District of Columbia, of the United States of America, taking into consideration the fact that those institutions are not under the patronage of the Federal Government, and in many cases not even under that of the several States, the titles and diplomas granted by the Colleges and Universities of those States, whose legislation offers reciprocity, and that may have been issued in accordance with the conditions prescribed in Article 4, of this Convention, shall be recognized.

This article was unanimously adopted. Debates and Resolutions, page 236.

Article 3 elicited considerable discussion. Some of the delegations, under the lead of Mr. Macedo, insisted that there was no sufficient reason for placing the medical profession upon any different footing from the other learned professions. He urged that there was no reason for making any exception in regard to the legal profession, as the facts of the medical science were more universal than legal rules. That certain branches of the law were peculiar to each State and that while the same was true with regard to some diseases, it was not true to so great an extent. To this Mr. Berjemo replied that in the case of the lawyer there is a power of control by the opposing lawyer and court, which does not exist in the case of the physician, and that hence a lack of requisite knowledge upon the part of the latter is more fatal; that as the practice of the other liberal professions is more under the eye of the public they are subjected to a vigilance which constitutes a form of control existing to but a slight degree in the case of the medical profession. Mr. Alzamora emphasized the fact that the other liberal professions deal with a more intelligent class of people than does the medical profession and that therefore there was need for a greater degree of control of the latter by the State. Mr. Gana called attention to what is not an unimportant point, viz: that the services of members of the other liberal professions are chosen much more deliberately and after greater investigation than is the rule in choosing members of the medical profession. The

article was finally approved by a unanimity of votes. Debates and Resolutions, page 240.

An amendment to Article 4 was introduced by Mr. Guachalla, for the purpose of overcoming "the difficulties that are offered by the diversity of legislations of the countries represented in this Conference, above all that of the United States of America, which have a special system in this matter and which, with the reform we propose, will place all the Signatory Nations on an equal footing." The amendment reads: "Each of the contracting parties shall give notice to the others, which are the universities in the signatory countries, whose titles and diplomas are considered valid for the practice of the professions, the subject matter of the Convention, in their respective territories." Though the good intentions in presenting this amendment are commendable, it is difficult to see how it would help matters much so far as the United States is concerned, unless, as is hardly probable, by "considered valid" is meant valid within limited territory merely and not throughout the Union.

The remaining articles were unanimously approved, without discussion.

In its final form the Convention contained the following provisions:

ARTICLE 1. The citizens of any of the Republics signing the present Convention, may freely exercise the profession for which they may be duly authorized by diploma or title granted by a competent national authority, of each one of the Signatory States, in any of the territories of the other nations, provided that such diploma or title complies with the regulations established in Articles 4 and 5, and that the laws of the country, in which it is desired to practice the profession, do not require the practitioner to be a citizen.

The certificates of preparatory and higher studies issued by any of the countries, parties to this Convention, in favor of citizens of one of their number, shall have in all the rest of the contracting countries the same effect as those authorized by the laws of the Republics of their origin, provided that they do not confer greater advantages than those recognized by the legislation of the country in which such certificates are to be used and provided that there shall be reciprocity.

ARTICLE 2. With respect to the professional titles issued by the colleges or universities of each State, Territory and of the District of Columbia, of the United States of America, in view of the fact that these institutions are not under the control of the Federal Government, nor in many case under that of the State Governments, the signatory countries shall only recognize the titles and diplomas issued by the colleges and universities of those States, whose legislation offers reciprocity, and which shall have been issued according to the conditions provided in Article 5 of this Convention.

ARTICLE 3. Each of the contracting parties reserves to itself, however, the right to require of the citizens of another country, who may present diplomas or titles of physician or of any other profession related to surgery or medicine,

including that of pharmacy, that they submit themselves to previous general examination in the branch of the profession which the respective titles or diplomas may authorize to be practiced, in such a manner as may be determined by each Government.

ARTICLE 4. Each one of the high contracting parties shall give official notice to the others which are the universities or institutions of learning in the signatory countries whose titles or diplomas are accepted as valid by the others for the practice of the professions which form the subject of this Convention.

As regards the observance of the foregoing provision by the United States of America, the Department of State of that country shall acquaint the other signatory Republics with the legislative acts of the respective States of the United States relating to the recognition of the titles and diplomas of the said signatory Republics and it shall convey to the various States of the United States whose legislation admits of reciprocity, the information which it may receive, making known the titles and diplomas of the respective institutions of learning or universities of the other Republics which the latter may recommend as valid.

The other high contracting parties shall give due recognition to the titles and diplomas of the universities of the States, Territories and District of Columbia of the United States, which each one of the high contracting parties may select.

Notwithstanding this provision, the educational institutions of the United States, which may not be recognized by the other signatory Republics and which may consider themselves sufficiently entitled to it, may solicit the recognition of their professional diplomas by the respective Governments, by means of a petition to be accompanied with the corresponding proofs, which shall be passed upon in the manner which each Government may deem proper.

ARTICLE 5. The diploma, title or certificate of preparatory or higher studies, duly authenticated, and the certification of identification of the person, given by the respective diplomatic or consular agent accredited to the country which has issued any of these documents, shall be sufficient to meet the requirements contemplated by this Convention, after they have been registered in the Department of Foreign Relations of the country in which it is desired to practice the profession, which Department shall inform the proper authorities of the country in which the respective title may have been complied with.

ARTICLE 6. The present Convention does not modify in any manner the treaties which the high contracting parties have now in force and which may offer greater privileges.

ARTICLE 7. The present Convention shall remain in force indefinitely, but any of the high contracting parties may abrogate it, in so far as such country is concerned, one year after having formally denounced it.

There shall not be indispensable for the enforcement of this Convention its simultaneous ratification by all the signatory nations. The country approving it, shall communicate such approval to the other States, through diplomatic channels, and such proceedings shall answer the purpose of an exchange of ratifications.

Edwin Maxey.